

tected tenant in respect of the controlled part only? It may well be so if the subject matter of such a tenancy comprises part controlled and part non-controlled premises the enjoyment of either of which by a tenant is not dependent upon occupation of the whole of the subject matter of the tenancy. In this case the plaintiffs have not, in my opinion, brought any evidence to show that such was the position of this sub-letting.

Where, however, as in my opinion the present case is one, there has been a single letting the subject matter of which comprises part controlled premises and part non-controlled premises and the facts are such that enjoyment of one part is dependent upon occupation of the whole I am of the view that a tenant under such a tenancy upon the expiration of his common law tenancy is entitled to hold over as statutory tenant of the whole of the subject matter of the original tenancy. It would, in my opinion, be wrong in principle in such a case to create two separate tenancies out of a single letting as this could never have been within the contemplation of the parties.

For all these reasons the appeal is allowed with costs here and below.

Appeal allowed.

Solicitors: *Lee & Lee; N. A. Christopher.*

SHAARI v. PUBLIC PROSECUTOR

[A.Cr.J. (Azmi J.) July 12, 1962]

[Ipoh — Criminal Appeal No. 94 of 1962]

Criminal Procedure — Undefended accused — Failure to explain case for prosecution — Prejudice — Criminal Procedure Code (Cap. 6), ss.257 and 422.

Criminal Law — Stolen property — Charge of dishonestly receiving — Penal Code, s.411.

This was an appeal against the appellant's conviction on a charge under section 411 of the Penal Code. In the Court below he was unrepresented by counsel and gave evidence denying knowledge of how the goods in question came to be where they were found. The record of the proceedings did not show that the requirements of section 257 of the Criminal Procedure Code were complied with. One of the grounds of appeal was that since the appellant was not represented by counsel, there was failure from complying with the requirements of the section and the trial was thereby vitiated.

Held: in this case, although the learned Magistrate had failed to explain the main points of the evidence against the appellant, he (the appellant) was able in his defence to give an intelligent reply; therefore, having regard to what had taken place subsequent to that the accused had not been prejudiced in his defence, the failure to comply with the provisions of section 257 of the Criminal Procedure Code had not occasioned any prejudice or a reasonable probability of prejudice but was an omission curable under section 422 of the Code.

Cases referred to:—

- (1) *N.A. Subramania Iyer v. King-Emperor* (1901), 28 I.A. 257.
- (2) *Willie (William) Slaney v. State of Madhya Pradesh* A.I.R. 1956 S.C. 116; [1955] 2 S.C.R. 1140.

A MAGISTRATE'S CRIMINAL APPEAL.

S. P. Seenivasagam for the appellant.

H. Sankey (Deputy Public Prosecutor) for the respondent.

Azmi J.: In this case the accused was charged as follows:—

B "That you between 3.30 p.m. on 19.9.60 and 7.30 a.m. on 20.9.60, at Jalan Senggang Estate, Seberang Manong, in the District of Kuala Kangsar, in the State of Perak, committed theft of 16 bunches of banana valued at \$12 belonging to one Low Tak I/C PK.005709, and that you thereby committed an offence punishable under section 379 of the Penal Code.

Alternatively:

C "That you on 20.9.60 at about 4.30 p.m. at Kg. Ara Panjang, Manong, in the District of Kuala Kangsar, in the State of Perak, dishonestly retained stolen property to wit 16 bunches of banana valued at \$12 belonging to one Low Tak I/C PK.005709, having reason to believe the same to be stolen property, and that you thereby committed an offence punishable under section 411 of the Penal Code."

D The prosecution case was that on the night of the 19th September, 1960, a banana planter found that a number of bunches of bananas were missing from his garden. The next morning a number of bunches of bananas were found in a shed built against a wall of the accused's shop at Kampong Ara Panjang. The accused was a shop-keeper doing business at the same premises, and one of the things he dealt in was bananas. A number of those bunches found were identified by the complainant as having been cut from his garden by some method of identification, which was not disputed by the defence.

F The accused gave evidence in the Court below denying knowledge of how those bananas came to be where they were found.

G The learned Magistrate convicted the accused for retaining stolen property under section 411 of the Penal Code. As the accused had three other previous convictions he sentenced him to 3 months' imprisonment and one year's police supervision.

H The appellant submitted several grounds of appeal but, in my view, there is only one ground which is of any substance. This ground alleges that since the appellant was not represented by counsel, the learned Magistrate failed to comply with the requirements of section 257 of the Criminal Procedure Code and the trial was thereby vitiated. Section 257(i) says as follows:—

I "257. (i) At every trial before the Court of a Magistrate if and when the Court calls upon the accused for his defence it shall, if he is not represented by an advocate, inform him of the right to give evidence on his own behalf, and if he elects to give evidence on his own behalf shall call his attention to the principal points in the evidence for the prosecution which tell against him in order that he may have an opportunity of explaining them."

There is nothing in the record of the proceedings to show that this was done. The Magistrate's notes merely say:—

"pp to 5.12.60 for continuation and to call for defence."

In the next line was the commencement of the accused's evidence.

Section 114 of the Evidence Ordinance was referred to by both counsel at the hearing before me. Illustration (e) of that section says the Court may presume that judicial and official acts are regularly performed.

Mr. Seenivasagam, for the appellant, says that presumption means that where any judicial or official act is shown to have been done in a manner substantially regular it is presumed that formal requisites of its validity were complied with, that is to say, if the Magistrate had shown in the notes that he had explained or had complied with the requirements of section 257 of the Criminal Procedure Code, then nobody should be allowed to say he has not done it properly. But in this case the learned Magistrate never did anything of that kind and for that reason the whole trial would be a nullity because section 257 makes it mandatory on the Court to call the attention of an accused person to the principal points in the evidence for the prosecution that tell against him.

In the case of *N. A. Subramania Iyer v. King-Emperor* ⁽¹⁾, the appellant was charged with 41 charges, extending over a period of 2 years, and tried in the same trial contrary to the provisions of section 234 of the Indian Criminal Procedure Code. This section corresponds to our own section 164(i) of the Criminal Procedure Code. Section 234 of the Indian Criminal Procedure Code reads as follows:—

"234. (1) When a person is accused of more offences than one of the same kind committed within a space of twelve months from the first to the last of such offences (whether in respect of the same person or not) he may be charged with, and tried at one trial for, any number of them not exceeding three."

The Privy Council in the above case held that a trial so conducted would plainly be prohibited and illegal and a conviction so obtained must be set aside and at page 263 the judgment said:—

"Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity. Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time, and those offences being spread over a longer period than by law could have been joined together in one indictment . . .

The remedying of mere irregularities is familiar in most systems of jurisprudence, but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted that this contravention of the Code comes within the description of error, omission, or irregularity."

I shall, however, refer to a more recent Indian case, namely, *Willie (William) Slaney v. State of Madhya Pradesh* ⁽²⁾, and the judgment of the Supreme Court in its appellate jurisdiction consisting of S. R. Das Actg. C.J., Bose, Jagannadhas, Imam and Chandrasekhara Aiyar JJ. The judgment of Bose J. at page 122, after referring to *Subramania Iyer* above, said:—

"(11) For a time it was thought that all provisions of the Code about the mode of trial were so vital as to

A make any departure therefrom an illegality that could not be cured. That was due to the language of the Judicial Committee in 28 Ind. App. 257 (PC) (D) (*supra*).

(12) Later this was construed to mean that that only applies when there is an express prohibition and there is prejudice.

x x x
B (15) The more recent attitude of the Judicial Committee is summed up by Sir John Beaumont in A.I.R. 1947 P.C. 67 at pp. 69-70 where he says that—

'The distinction drawn in many of the cases in India between an illegality and an irregularity is one of "degree" rather than of "kind", and by Viscount Sumner in *Atta Mohammad v. Emperor*, A.I.R. 1930 P.C. 57 (2) at p. 59 (G)—

C 'In the complete absence of any substantial injustice, in the complete absence of anything that outrages what is due to natural justice in criminal cases, their Lordships find it impossible to advise His Majesty to interfere.'

D (16) We prefer this way of stating the law, for the distinction that was once sought to be drawn between an express prohibition and an equally express provision positively stated strikes us as unreal. The real question is not whether a matter is expressed positively or is stated in negative terms but whether disregard of a particular provision amounts to 'substantial' denial of a trial as contemplated by the Code and understood by the comprehensive expression 'natural justice'."

Previously at paragraph 13, Bose J. said:—

E "(13) . . . Except where there is something so vital as to cut at the root of jurisdiction or so abhorrent to what one might term natural justice, the matter resolves itself to a question of prejudice. Some violations of the Code will be so obvious that they will speak for themselves as, for example, a refusal to give the accused a hearing, a refusal to allow him to defend himself, a refusal to explain the nature of the charge to him and so forth.

These go to the foundations of natural justice and would be struck down as illegal forthwith . . .

F These violations will not be so obvious and it may be possible to show that having regard to all that occurred no prejudice was occasioned or that there was no reasonable probability of prejudice."

G In the case before me, the accused was able, as shown in his evidence, to explain the evidence given and in my opinion, if the Magistrate had accepted his denial of the knowledge of the bananas he would be acquitted. In other words, though the Magistrate had failed to explain the main points of the evidence against the appellant, he was able in his defence to give an intelligent reply.

H I would, therefore, although section 257 of the Criminal Procedure Code did appear at first sight to be mandatory by reason of the words "shall call his attention", I would say that having regard to what had taken place subsequent to that the accused had not been prejudiced in his defence and would, therefore, say that in the present case the failure by the Magistrate to comply with the provision of the section had not occasioned any prejudice or a reasonable probability of prejudice but is an omission curable under section 422 of the Criminal Procedure Code.

This appeal is, therefore, dismissed.

Appeal dismissed.

Solicitors: S. Seenivasagam & Sons.